United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

75-1026

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To be argued by
WILLIAM R. BRONNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1026

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Fred J. Zeehandelaar appeals from a judgment of conviction entered on January 3, 1975 in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 74 Cr. 938, filed on October 2, 1974, contained two counts. Before trial the first count was severed, and the trial went forward solely on Count Two.* Count

* Count One charged defendant with making a false statement in connection with an application to the Department of the Interior to import cheetahs into the United States, in violation of Title 18, United States Code, Section 1001, a charge which had been the subject of an earlier indictment and trial. Defendant's first trial had ended in a conviction, but that conviction was reversed on appeal to this Court. *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir. 1974).

Two charged the defendant with making a false declaration before the court and jury during an earlier trial in which he had also been the defendant, in violation of Title 18, United States Code, Section 1623.

Trial commenced on November 22, 1974 and concluded on November 27, 1975 with a guilty verdict. On January 3, 1975, Judge Ward sentenced defendant to a one-year period of unsupervised probation and imposed as a condition of probation that he pay $5,000 to the Department of the Interior for use in connection with the preservation of endangered species.*

Statement of Facts

The Government's Case

A. Introduction.

The prosecution in this case established that defendant falsely testified at his earlier trial about the dealings he had had with Melvin B. Lovell and Frank H. Gilbert. The charge at the earlier trial had been that in connection with efforts to import live cheetahs into the United States for Wild Kingdom, Inc., an animal farm in Orlando, Florida, the defendant, who is a wild animal dealer, had "backdated" certain documents in order to avoid the restrictions imposed by the Endangered Species Conservation Act of 1969 (the Act) and the regulations issued thereunder. A critical issue at that trial was whether Zeehandelaar, who admitted backdating the documents in question, had acted with the intent to violate the law. On this issue, the Government introduced proof that in dealings with Lovell and Gilbert shortly after the events

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* Count One was dismissed upon the Government's motion at the time defendant was sentenced on Count Two. Reference herein to "the Indictment" shall refer to Count Two.

covered by the earlier indictment, the defendant had offered to take similar illegal actions to circumvent the Act. Zeehandelaar disputed this evidence and testified that Lovell was the one who had proposed that the illegal steps be taken and that he had rejected this proposal. It was this testimony which the prosecution established to be false at Zeehandelaar's trial for perjury.

B. The Endangered Species Conservation Act of 1969 and the Cheetah.

The Endangered Species Conservation Act of 1969 * was passed to preserve certain types of wild animals from extinction. Under the legislation, the Department of the Interior was charged with creating a list of endangered species, which would be protected by the provisions of the Act and the regulations issued under it. In basic part, the Act sought to protect these endangered species by severely restricting their importation into the United States and their subsequent transfer between different owners once in the United States without the prior permission of the Department of the Interior (16 U.S.C. § 668cc-2—668cc-3 (1970)).

Additions and deletions to the endangered species list are made, as in other instances of administrative rule making, by first publishing the proposed changes in the Federal Register and calling for public comment and then by formally promulgating the additions and deletions. The cheetah was not on the original list promulgated by the Department of the Interior (50 C.F.R. (1970) Part 17, Appendix A, 35 Fed. Reg. 8495 *et. seq.*), However, on February 3, 1972, the Department of the Interior gave public notice that it was contemplating adding the cheetah to the endangered species list, and on March 30, 1972, the cheetah was formally designated an endangered species (A833-A845).**

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* 16 U.S.C. § 668aa et. seq. (1970), Pub. L. 91-135, Dec. 5, 1969, 83 Stat. 275. The Act has now been superseded by the Endangered Species Act of 1973, 16 U.S.C. § 1531 et. seq. (1973), Pub. L. 93-205, Dec. 28, 1973, 87 Stat. 884.

** References preceded by "A" are to appellant's appendix on the instant appeal.

After March 30, 1972, therefore, it was impossible legally to import any cheetah into the United States or to transfer the ownership of that cheetah after importation without the prior approval of the Department of the Interior. To secure such approval, the applicant had to satisfy the Department either (1) that it had a legitimate zoological, educational, scientific or propogative purpose to own a cheetah, or (2) that the applicant had a valid contract to import a cheetah prior to the date the cheetah was listed as an endangered species and that the applicant would suffer economic hardship if the contract were not honored. The date an importation contract was executed was, as a result, significant for anyone planning to apply for a "commercial hardship" permit (16 U.S.C. § 668cc-4(b), (c)).*

Zeehandelaar was a large animal dealer. He was, consequently, experienced with the intricacies of the Act. Moreover, he was a subscriber to and an avid reader of the sections of the Federal Register dealing with endangered species (A849, A986-A987).

C. Zeehandelaar's dealings with Lovell and Gilbert.

In the spring of 1972, Lovell and Gilbert, both of whom lived in Arizona, were interested in importing a pair of cheetahs (A504-A506, A535, A687-A689). They had been referred to the defendant as a possible importer, and on April 15, 1972, Lovell called both the defendant's office in New York and subsequently his motel in Tucson, where he had been informed defendant was attending a conference, leaving messages for defendant to call him (A508-A509). A short while later, defendant returned Lovell's call. Lovell said he was interested in procuring a pair of

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* In fact, an applicant was hard pressed to argue that a bona fide economic hardship existed if the contract was entered into after the proposed rule making date (A857).

cheetahs and that he would like to set up a meeting to discuss this with defendant. Defendant suggested that Lovell meet him at the Arizona Inn where the conference was taking place. Nothing was said about the manner in which the Department of the Interior's approval for the importation of the cheetah would be sought (A510).

Lovell and Gilbert, their wives and another couple drove down to Tucson on the same day. Upon their arrival, Lovell called Zeehandelaar, who was in his room, but Zeehandelaar was about to go to a meeting and could not talk to them (A516-A517). Zeehandelaar suggested that they wait for him in the lounge where he would be able to talk to them when the meeting was over (A516-A517). Neither Lovell nor Gilbert had met Zeehandelaar before, so Lovell then asked Sue Pressman, an official of the Humane Society also at the conference, who knew Zeehandelaar, to join them in the lounge (A516-A519, A693-A694).

Eventually Pressman pointed defendant out to Lovell and Gilbert, at which point the two men left the table where the group had been sitting and met Zeehandelaar as he came into the lounge. Lovell introduced himself and Gilbert to Zeehandelaar, and the three men sat down at a small table across from where the others were sitting. The subject of cheetahs was immediately raised, and Lovell stated that he and Gilbert wanted to import a breeding pair. He went on to say that they thought they could get a zoological import permit for captive propagation purposes, since Lovell had had previous experience with the breeding of ocelots, another wild cat. He explained that their reason for importing the cheetahs was to perform an experiment by applying his successful ocelot breeding theories to cheetahs. (A502, A520-A521, A563-A564, A695).

Zeehandelaar was skeptical about their chances of ever obtaining a zoological import permit. When he learned Lovell had previously spoken with someone at the Department of Interior about such a permit, he told the two men that they had already made their first mistake. He stated that there were two ways to get the animals—either two could be siphoned off a large order he had coming in for Lion Country Safari, or they could backdate a contract to show that a firm order had been entered into before the cheetah had been listed as an endangered species and, thereby, obtain a commercial hardship exemption (A520-A521, A695-A697, A753).

Lovell and Gilbert expressed no interest in either of the offers, both of which were illegal (A522). Instead, shortly after his meeting with defendant, Lovell indignantly asked Sue Pressman why she had recommended Zeehandelaar to them, since he had just made them an illegal offer (A1003-1004, A1023).

D. The Perjurious Version.

Zeehandelaar's version of his phone conversation with Lovell and of his meeting with Lovell and Gilbert was established by reading from the record of his direct testimony at the prior trial (A981-A985).

At his first trial, he testified that in the initial telephone conversation, he had told Lovell that it was unlikely either that he could get permission to transfer cheetaths to him from another expected shipment or that Lovell could obtain his own zoological permit. Lovell, he said, then proposed that they backdate a contract in order to qualify for a commercial hardship exemption. To this suggestion, he testified that he had said "Sorry, that's can't be done." He went on to say that he had been briefly introduced to Lovell and Gilbert at the Arizona Inn on April 18, 1972,

three days after Lovell and Gilbert testified they met him, but that he had had no time to speak to them before he rushed off on a trip to the Phoenix Zoo. Lastly, he denied ever making an illegal offer concerning cheetahs to Lovell.

The Defense Case.

Zeehandelaar called two witnesses but did not testify himself. The first witness, Walter Freundlich, was an employee of defendant's, and he testified that while in defendant's office on April 15, 1972, he received a telephone call from Lovell (A1064-A1079). The second witness, William York, was a former employee of Lion Country Safari. He testified that Lion Country Safari had never placed an order for any cheetahs with Zeehandelaar (A1080-A1082).*

ARGUMENT

POINT I

The issues presented for resolution by the trial jury were crystal clear.

Defendant argues at some length in his brief that the prosecution attempted to mislead the grand jury, trial court and petit jury by shifting the focus of defendant's perjurious statements from a telephone conversation between defendant and Lovell to a face-to-face meeting between defendant, Lovell and Gilbert (Defendant's Brief at 21-23). Moreover, the thrust of many of the other contentions defendant makes on appeal is that he was deprived of a fair trial because the issues in the case had become confused.

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* The defendant also called a third man as a character witness. He testified on direct examination, but after the trial judge ruled that the Government could cross-examine him about the earlier indictment and the events revealed at defendant's first trial, defendant on his own motion was allowed to have the witness' testimony struck (A760-A804).

There is, however, no support in the record for these arguments. As will be shown, the issues presented for resolution before the District Court were framed with great clarity.

The critical issue raised by the indictment quite simply was: Did the defendant testify falsely at his first trial when he said that Melvin B. Lovell, not he, was the one who had proposed that certain illegal actions be taken in order to avoid the federal regulations concerning the importation of cheetahs? Even before the Government filed its bill of particulars in the instant case, this issue must have been clear to defendant. At his first trial,* defendant had testified that during a phone call between him and Lovell, Lovell had proposed they take illegal steps to import cheetahs. On the other hand, Lovell denied that he had said any such thing, and both he and Gilbert testified that defendant was the one who had made the illegal proposition in a subsequent face-to-face meeting between the three men.** The indictment charged in substantive part, therefore, that defendant's testimony as to what was said in the phone call between Lovell and him concerning the illegal importation of cheetahs was false and further that

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* Despite any confusion engendered by the wording of the first indictment, the basic issue at his first trial was whether defendant had intentionally falsified certain documents in connection with an application to import cheetahs into the United States. Proof that he had attempted to do the same thing with Lovell and Gilbert on another occasion was of great import in resolving that issue.

** The testimony of defendant, Lovell and Gilbert referred to in the text may be found at pages 182-187, 333-341, and 526-530 of the record in *United States* v. *Zeehandelaar*, Dkt. No. 73-2703, *supra;* their testimony is also summarized in that opinion, 498 F.2d at 354-355.

his general denial that he had ever made an illegal offer to import cheetahs to Lovell was false.*

Nonetheless, in his pretrial motions, defendant professed that the indictment did not indicate with sufficient clarity "which portions of defendant's [quoted] testimony . . . [were] claimed to be false" and that "the affirmative material matter concerning which defendant is alleged to have testified falsely is not . . . sufficiently negatived to enable defendant to prepare his defense" (A21-A22). In response, the Government offered to delete certain prefatory material in the testimony of defendant quoted in the indictment,** and replied that the Government's bill of particulars would make it abundantly clear what the the Government contended had in fact been said between defendant, Lovell and Gilbert (A57, A86-A88, A103-A105).

The Government's bill of particulars *** identified the "discussion or discussions" referred to in the indictment between defendant, Lovell and Gilbert as having taken place, first, in a phone call between defendant and Lovell

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* The two material specifications of perjury appear in the last two answers of defendant quoted in the indictment. See p. 10, *infra* for these answers. It is noteworthy that, contrary to the impression defendant creates in his brief, the second material specification relates not to defendant's phone call with Lovell but is a general denial that defendant at *any* time made an illegal offer concerning cheetahs to Lovell.

** The prefatory material set out the phone number at which defendant contacted Lovell and defendant's version of what was said in his phone call with Lovell on the subject of cheetahs before Lovell allegedly made his illegal offer to him. This prefatory material comprised the first ten paragraphs of defendant's testimony quoted in the indictment (A7-A8), and is set out, *infra*, at page 20.

*** The bill of particulars was omitted from appellant's appendix. For the convenience of the Court, defendant's request for a bill of particulars and the Government's bill of particulars are included in an appendix submitted by the Government.

on April 15, 1972 and, second, in a meeting later on the same day between the three men in the Arizona Inn, Tucson, Arizona. In order to understand fully the response given in the bill of particulars, it would be useful at this juncture to set forth the materially false testimony of defendant quoted in the indictment:

"Q. What is the subject of the information?

A. I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell (*sic.*), entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species List.

Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

He then asked me what if I sign a contract dated in March. And I said "Sorry, that can't be done."

Q. Did you *ever* state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you *ever* say that in substance or in words? (emphasis supplied).

A. No, sir."

With respect to this testimony, the bill of particulars stated:

> "[The testimony is] false in that defendant never told either Mr. Lovell or Mr. Gilbert that the "switching" of Cheetahs from the "kingdom permit" to them would be difficult because they did not have a contract "prior to the effective date that the Cheetah was placed on the Endangered Species List." Nor, did defendant state that he considered it "unlikely" that the Department of Interior would allow him to do the "switching." Furthermore, neither Mr. Lovell or Mr. Gilbert asked him to "sign a contract dated in March, and he never responded to any such request by saying " 'sorry, that can't be done.' " In truth, defendant told Mr. Lovell and Mr. Gilbert that while it was illegal to import Cheetahs into the United States without a permit, he could siphon off several Cheetahs for them from a shipment he expected for another customer.
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> * * * * *
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> Lastly, it was he, not Mr. Lovell or Mr. Gilbert, who proposed that a contract for the importation of Cheetahs be back-dated to before the effective date of the regulations of the Department of the Interior controlling the importation of that animal into the United States so as to avoid the impact of those regulations."
>
> Government's Bill of Particulars, ¶ 2a-2b1.

To clarify matters for the trial jury, the District Court before trial ordered that the prefatory material in the indictment be struck and that a redacted indictment omitting this material be prepared (A327-A342), which was done (A9-A10).

At the trial, Lovell and Gilbert again testified as to everything which defendant had said to them—Lovell as

to his phone call with defendant and as to the meeting at the Arizona Inn, Gilbert as to the latter meeting (A498-A523, A685-A714). Portions of defendant's testimony at his first trial, including his version of both the phone call and the face-to-face meeting at the Arizona Inn, were read to the jury (A977-A985). The issue was thus squarely put to the jury: Did they believe Lovell's and Gilbert's version of what had happened, or did they believe defendant's diametrically opposed version? The jury resolved the issue against defendant.

From the foregoing, it is apparent that the focus of the issue to be resolved was clear and never shifted. The question remained throughout whether it was defendant or Lovell who made the illegal proposition concerning the cheetahs. The answer to this question always depended on an evaluation of everything that transpired between Lovell, Gilbert and defendant. Proof relating to the phone call between defendant and Lovell established the falsity of defendant's version of this phone call. Proof of what happened at the face-to-face meeting between the three men had a direct relationship in establishing what was said in the phone call between defendant and Lovell, and, equally important, it established the falsity of defendant's statement that he had never made an illegal proposition to Lovell. In the final analysis, then, defendant's attempt to create the impression that the issues tried below were at any time confused has no support in the record for the simple reason that there was no confusion.

POINT II

Defendant's right under the Fifth Amendment to be tried only upon an indictment voted by a grand jury was not violated.

Defendant argues that his conviction should be set aside because his right to be tried only upon an indictment voted by a grand jury was violated. More specifically, he contends: (1) that the grand jury was deceived by the form of the indictment presented to it to vote upon and by the Government's failure to advise it that an earlier grand jury had refused to vote an indictment in the matter, and (2) that the District Court's order striking the prefatory portion of his testimony quoted in the indictment constituted an impermissible amendment of the charges voted by the grand jury. His contentions have no merit.

A. The grand jury was deceived neither by the form of the indictment presented to it nor by the Government's failure to advise it of the action of any prior grand jury or petit jury.

With respect to his argument concerning the form of the indictment, defendant states that the portion of his testimony quoted in the indictment does not indicate that other intervening testimony which he gave had been omitted.*

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* There is no dispute over this fact. For the convenience of the Court, in the Government's appendix, the full transcript of the testimony given by defendant on his dealings with Lovell and Gilbert is set out, with the portion appearing in the indictment italicized. In each instance when intervening material was omitted, this was done solely to eliminate testimony irrelevant to the charges being considered. While there was no attempt either before the grand jury or the trial jury to conceal the intervening testimony, the Government concedes that as a practical matter asterisks might have in each instance been inserted in the indictment to show more specifically that matter had been eliminated.

From this, he contends that the grand jury was deceived into believing that it was indicting solely on defendant's version of the telephone conversation between Lovell and himself and not on the totality of evidence surrounding defendant's discussions individually with Lovell and together with Lovell and Gilbert.

Shorn of excess verbiage, defendant's argument is that the wording of the indictment presented to the grand jury for a vote deceived it and that, therefore, the indictment is a nullity. To support this rather novel theory that the wording of an indictment can deceive a grand jury, defendant cites not one case or other legal authority. In fact, this theory is not weighty enough to overcome the presumption of regularity concerning grand jury proceedings, *Costello* v. *United States* 350 U.S. 359 (1956); *United States* v. *Nunan*, 236 F.2d 576, 594 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 39 (8th Cir.), *cert. denied*, 373 U.S. 904 (1963); *cf. United States* v. *Calandra*, 414 U.S. 338, 345 (1974), and on that basis alone, the proceedings of the grand jury should not be disturbed.

Even if defendant's argument is considered on the merits, it is still unconvincing. As indicated, defendant claims that the editing of his testimony quoted in the indictment deceived the grand jury when the indictment was presented to it. This argument, like that discussed in Point I, *supra*, depends on the inaccurate and strained view of the indictment which makes irrelevant the facts of the subsequent face-to-face meeting to the grand jury's assignment of perjury. Moreover, the necessary corollary of Zeehandelaar's argument is that had the grand jury been apprised of the full extent of defendant's testimony at his first trial, it would have been capable of comparing the testimony quoted in the indictment with defendant's full testimony and would not have been deceived. In fact, the grand jury

voting indictment 74 Cr. 938 had defendant's full trial testimony before it,* and it was not deceived in any manner. Finally, there is absolutely nothing in the record—or any showing in Zeehandelaar's brief—which can support an argument that the testimony omitted from the indictment contained anything suggesting that the testimony charged as perjury was not perjurious.

In sum, the Government did nothing more than to delete certain portions of defendant's testimony so as to eliminate irrelevant material. This practice was entirely proper and did not invalidate the indictment. *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1248-9 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973); *United States* v. *Rook*, 424 F.2d 403, 405 (7th Cir.), *cert. denied*, 398 U.S. 966 (1970).

Defendant's second point, concerning the failure of the Government to apprise the grand jury voting indictment 74 Cr. 938 that another grand jury failed to vote an indictment in the matter, is equally without merit. A brief review of the relevant facts may be of assistance to the Court in disposing of this contention. The mandate of the Court of Appeals reversing defendant's first conviction was received by the District Court on June 13, 1974. Between that date and late September, 1974, counsel for defendant and counsel for the Government were engaged in negotiations to dispose of the case by plea. These negotiations ultimately broke down in late September, 1974, and the District Court began to press to bring the matter to trial a second time. Since the first indictment had been held in-

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*This fact is obvious from even a cursory examination of the grand jury minutes. The Government joins with defense counsel in urging the Court to review these minutes for the purpose of confirming this and succeeding representations about what transpired in front of the grand jury.

firm and believing that a false declaration charge should be included in the charges against defendant, the Government presented the original case and the new false declaration matter to the September regular grand jury, which refused to vote an indictment. Several days later, a more complete presentation was made to the October regular grand jury, which proceeded to vote indictment 74 Cr. 938. The October regular grand jury was concededly not told of the actions of the September regular grand jury.*

Based on the above facts, defendant argues that the prosecutor deliberately withheld from the October grand jury the information concerning its predecessor's action so as to avoid giving it information which in the prosecutor's mind would be an impediment to an indictment. This, it is contended, brings the present case under the narrow rule of *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), which holds that affirmative prosecutorial misdirection of a grand jury can void an indictment.

The narrowness of the rule and the quantum of misdirection required for its invocation cannot be overemphasized. This Court has never expanded *Estepa* beyond its facts despite innumerable requests that it do so. *E.g.*, *United States* v. *Harrington*, 490 F.2d 487, 489 (2d Cir. 1973); *United States* v. *Ramirez*, 482 F.2d 807, 812 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973). The case has been distinguished by the First (*United States* v. *Jett*, 491 F.2d 1078, 1081-1082 (1974)), Fifth (*United States* v. *Cruz*,

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* The chronology of events set forth in the text is drawn from the affidavit of Assistant United States Attorney William R. Bronner submitted in opposition to defendant's pretrial motion (A53-A88).

The Government felt that defendant was entitled to raise any issue he believed relevant by the failure of the September, regular grand jury to vote an indictment; as a result, this fact was made known to defense counsel.

478 F.2d 408, 410-411, *cert. denied sub nom., Fuentes* v. *United States,* 414 U.S. 910 (1973)), Seventh (*United States* v. *Annerino,* 495 F.2d 1159, 1162 (1974)), Eighth (*United States* v. *Powers,* 482 F.2d 941, 943 (1973)), *cert. denied,* 415 U.S. 923 (1974)), and Ninth Circuits (*United States* v. *Polizzi,* 500 F.2d 856, 887 (1974)), *United States* v. *Short,* 493 F.2d 1170, 1172, *modified,* 500 F.2d 676 (1974)). We know of no Court of Appeals case in which it has been invoked to support the dismissal of an indictment.

What occurred before the grand jury which returned the present indictment was in any event not misdirection, for there is no requirement that a grand jury be told of the results of the deliberations of any other grand or petit jury. It is hornbook law that an indictment may be voted even though some other grand jury has refused to indict. *United States* v. *Thompson,* 251 U.S. 407, 413-414 (1920); *United States* v. *Schack,* 165 F. Supp. 371, 375-376 (S.D.N.Y. 1958) (Weinfeld, *J.*). *See, also,* 1 Wright, *Federal Practice and Procedure* § 111 at p. 205 (1969). A preceding grand jury's refusal to indict has simply no relevancy to probable cause and consequently there is no reason to bring that fact to a later grand jury's attention if the case is represented. *Cf. United States* v. *Del Toro,* Dkt. No. 74-2021 (2d Cir. Feb. 27, 1975), slip op. at 1977-1978.* A jury, whether it be a petit or grand jury, is an impartial body whose reason for being is to make up its own collective mind concerning the merit of the matter presented to it based solely on the evidence before it. What

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* A similar contention was raised in *United States* v. *Gugliaro,* 501 F.2d 68 (2d Cir. 1974). Gugliaro had been tried and acquitted of mail fraud and stock fraud. He was the indicted for perjury for his testimony at that trial. At his perjury trial Gugliaro was not permitted to prove his acquittal at his earlier trial. His contention that this exclusion was error (see Brief for the United States in *United States* v. *Gugliaro,* Dkt. No. 74-1378, Point II) was rejected by the Court without discussion.

another jury found at a different trial or presentation should not intrude into its deliberations because, if it does, the very real risk exists that the second body will be influenced not solely by the evidence before it but by what some other jury concluded or failed to conclude on evidence which may, as here, be different in content or quality. Accordingly, since the law permits the Government the right to submit the same matter to two grand juries, there can be no requirement that the second grand jury be advised of the actions of any other grand jury which considered the matter.* There was, therefore, no impropriety in the manner in which the Government obtained the indictment in this case.

B. There was no amendment of the indictment, but rather a permissible excision of surplusage.

Defendant's final contention with respect to the grand jury proceedings and the resulting indictment is that the District Court, in ordering the prefatory testimony of defendant quoted in the indictment struck, impermissibly amended the indictment. The beginning point for any analysis of the extent to which matter may be struck from an indictment is *Ex Parte Bain*, 121 U.S. 1 (1886). The indictment in *Bain* charged that Bain and several accomplices had prepared a false report in connection with the affairs of a national bank with "intent to deceive *the Comptroller of the currency and* the agent appointed to examine the affairs of" the bank. 121 U.S. at 4. The trial court struck the italicized portion quoted above and

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* Logically, if the October grand jury which voted indictment 74 Cr. 938 should have been told of the September grand jury's failure to indict, it should also have been told that the very first grand jury in this case voted an indictment and that a petit jury convicted defendant on it. These matters were also not put before the October grand jury which returned the indictment.

proceeded to the trial of Bain under the altered indictment. Even though the altered indictment was legally sufficient, the Supreme Court vacated Bain's conviction because it found that the change in the indictment constituted an unconstitutional amendment of it. Ever since *Bain*, "the law has been in a 'confused state' . . . as to whether any alteration [to an indictment] is permissible and if so, how any appropriate changes may be made." *United States* v. *Cirami*, Dkt. No. 74-1492 (2d Cir., Jan. 24, 1975), slip op. at 6052.*

As distilled from *United States* v. *Cirami*, *supra* and *United States* v. *Colasurdo*, 453 F.2d 585, 590 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), the reach of the the *Bain* doctrine in this Circuit has been limited to "deletions of unnecessary language . . . [which] work an impermissible 'fundamental change' in the charge set forth in an indictment." *United States* v. *Cirami*, *supra*, slip op. at 6052. A fundamental change has been defined as one leading to the belief that there is a "substantial likelihood that the grand jury would have failed to indict" had they been advised of the change in the indictment effected by the deletion of the unnecessary language. *United States* v. *Cirami*, *supra*, slip op. at 6052. *See, also, United States* v. *Archer*, 455 F.2d 193, 194 (10th Cir.), *cert. denied*, 409 U.S. 856 (1972).

For the purpose of determining the effect, if any, of the deletion of the language from indictment 74 Cr. 938, the entire testimony struck from the indictment is set forth below.

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* Defendant's reliance on *Stirone* v. *United States*, 361 U.S. 212 (1960) is misplaced. In *Stirone*, the Supreme Court held that it is impermissible to *add* material to an indictment without resubmitting it to a grand jury. As this Court said in *Cirami*, the *Stirone* decision probably did more to erode *Bain* than it did to affirm its strict application.

Q. Whom did you phone and what number did you call? A. I telephoned Mr. Lovell (*sic.*) at this number, 6 - - - area code 602-937-4330.

Q. And what conversation did you have with him? A. . . . He then asked me whether there was any other way of getting cheetahs, of a different kind of permit.

I then told him that it was my intention to apply for a commercial permit for 20 cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

Q. From whom? A. From U.S.D.I. From U.S.D.I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

That privilege is printed on the permit.
I told him also——

By comparing the material quoted immediately above with that in the indictment previously set out (Point I, *supra*), it is apparent that the only testimony eliminated concerned the telephone number at which defendant called Lovell and certain background information pertaining to defendant's attempt to obtain cheetahs for a party other than Lovell or Gilbert. But as previously indicated, defendant contends that by editing his testimony to begin with, the Government created the impression that everything he said concerned solely one phone conversation with Lovell and that by then redacting the indictment, the Government created the contrary impression that everything he said concerned the face-to-face meeting between himself,

Lovell and Gilbert. He argues that the effect of the redaction, therefore, constituted an impermissible amendment to the indictment. This contention is without merit.

It is abundantly clear that only background material was struck from the indictment, the sole function of which was to set the context in which the first of defendant's false declarations was made. The District Court's decision to strike this prefatory testimony was simple recognition that this testimony was not materially false and that, consequently, it was unnecessary to the indictment or—as Zeehandelaar claimed—misleading.* Inasmuch as the stricken testimony was clearly immaterial, its elimination did not create a fundamental change in the indictment, and there is no likelihood, substantial or otherwise, that the indictment would not have been voted without it. Moreover, contrary to Zeehandelaar's contention, the excision of this surplusage cannot be said to have misled the trial jury as to the context of the questions and answers set forth as perjurious, since Zeehandelaar's testimony at his first trial, insofar as it concerned his dealings with Lovell and Gilbert, was read to the trial jury in its entirety (A977-A985).

Finally, the redaction of the indictment did not change the "focus" of the issues which were to be resolved. As has been illustrated, that focus was initially and remained

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* At worst, this testimony was another specification of perjury, which under the theory that each separate specification of perjury is sufficient by itself to sustain a single perjury charge, *United States* v. *Pollak*, 474 F.2d 828, 832 (2d Cir. 1973); *United States* v. *Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948), was properly severed and dropped.

throughout the trial on a single question: Did defendant testify falsely when he said Lovell was the one who proposed that certain illegal actions be taken in order to import cheetahs into the United States. The answer to this critical question transcended any single conversation between defendant and Lovell, depending for its resolution on an examination of everything that happened between them. Redacting the indictment did no more than put this fundamental issue into sharp focus for the trial jury.*

POINT III

The District Court properly allowed the Government to read portions of defendant's testimony at the prior trial other than those portions claimed to be perjurious.

At the trial below, the Government was permitted to read a limited portion of defendant's testimony from his first trial to the jury (A950-A988). This included, of course, his version of what transpired between Lovell, Gilbert and himself, together with portions of his testimony concerning the issues at his original trial.** The latter testimony was read so that the jury might have a full understanding of the issues before it and so that the jury could determine the issues of motive and intent. Defendant insists, however, that this was error because

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* It would be a peculiar miscarriage of justice to permit defendant, who argued first that he did not know which portion of his quoted testimony was materially false and who then strenuously tried to keep all background portions of his testimony from the trial jury, to argue now that if everything he had asked for had been done there would have been an impermissible amendment of the indictment.

** An excellent summary of this latter testimony was given by the trial judge in his charge to the jury (A1171-A1172).

(1) he asserts he never contested the issue of intent, and (2) he claims the jury should not have been advised through the use of this evidence or in any other manner that the alleged false testimony came in a case in which he was the defendant.

Despite defendant's bald assertions to the contrary, it is impossible to believe after examining the record that motive and intent were not in issue. In fact, if they were not in issue, it is difficult to see what was. Certainly, defendant does not contend that as between himself, Lovell and Gilbert, someone did not propose that illegal steps be taken to import cheetahs into the United States. He does not contend, furthermore, that his version as to what transpired is the same as Lovell's and Gilbert's. This being so, one or more of the three men was either motivated to testify falsely or so forgetful that the false testimony which was given was unintentional. On any reasonable analysis, then, the question of intent—both defendant's and Lovell's and Gilbert's—was not just one of the issues, but the critical issue at trial. The reading of defendant's testimony was, therefore, perfectly proper to establish the setting in which the testimony was given and to establish defendant's motive and intent in so testifying. *United States* v. *Santana*, 503 F.2d 710, 716-717 (2d Cir. 1974); *United States* v. *Weiss*, 491 F.2d 460, 467 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3209 (October 15, 1974); *Gebhard* v. *United States*, 422 F.2d 281 (9th Cir. 1970); *Smith* v. *United States*, 392 F.2d 169 (5th Cir.), *cert. denied*, 393 U.S. 941 (1968); *United States* v. *Letchos*, 316 F.2d 481, 485 (7th Cir.), *cert. denied*, 375 U.S. 824 (1963); *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955).

Defendant's second contention is simply specious. If his argument is solely that the jury should not have known he was the defendant in the first case, this is clearly incorrect, for this is one of the background factors they could consider in judging his intent. *Cf. Reagan* v. *United*

States, 157 U.S. 301, 310 (1895); *United States* v. *Mahler,* 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Hill,* 470 F.2d 361, 363-365 (D.C. Cir. 1972). If his point is that the reading of his testimony put before the jury proof of unrelated crimes, this argument is not borne out by the record. Apart from his transactions with Lovell and Gilbert, the only other testimony the jury heard concerned the events underlying defendant's previous case, and proof of these events, even if they did constitute a crime,* was admissible for the reasons previously stated.

Finally, any possible prejudice to defendant was precluded by six steps which the trial judge took to insure defendant's rights were protected. The six steps were: (1) the court instructed the jury that the prior testimony was merely background information given in order to assist the jury in determining whether the defendant knew that his statements set forth in the indictment were false when he made them; (2) the court only allowed the reading of certain portions of Zeehandlelaar's direct testimony; (3) the court allowed separate defense objections to each passage sought to be read by the Government; (4) the court excluded from evidence all exhibits referred to in the testimony being read; (5) the court made a careful inquiry into the possible prejudice of each item which was to be read; and, (6) the court offered the defense the opportunity to read any desired portions of Zeehandelaar's prior testimony immediately following the Government's

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* Assuming the jury understood from the testimony read to it that defendant had committed another crime by submitting backdated documents to the Department of the Interior, this evidence was admissible because it was inextricably related to an understanding of what motivated defendant to make a false declaration at his former trial. The impact of this on defendant, moreover, was no greater than that which resulted when the jury was properly advised that he was the defendant in the earlier case.

reading (A934-A988). In light of all of the circumstances, the reading of defendant's trial testimony was correct and was done in the fairest possible fashion.

POINT IV

There was no impropriety in the prosecutor's closing remarks.

Defendant contends that the Government's summation was improper because: (1) the prosecutor personally expressed his belief in the guilt of defendant and vouched for the credibility of Lovell and Gilbert, and (2) the prosecutor unfairly drew attenttion to defendant's failure to testify. A reading of the full context in which the allegedly improper comments of the prosecutor were made shows, however, that there was no error.

To begin with, defendant contends that by the use of the phrase "in truth" in his summation, the prosecutor asserted his own personal belief in defendant's guilt. (Defendant's brief, pp. 35, 38-39). Taken in context, the use of this phrase merely referred back to the lead-in sentence of a moment before when the prosecutor said "So what, then, is false, *or what does the government argue is false here.*" (emphasis supplied) (A1124). The "in truth" phraseology was then used to set forth the Government's contention as to what had in fact transpired. Seen in this light, the use of this phrase is not an ambiguous, covert expression of personal belief.* *See United States* v. *Torres*, 503 F.2d 1120, 1127 (2d Cir. 1974); compare *Lawn* v. *United States*, 355 U.S. 339, 359-360 n. 15 (1958) with *Hall* v. *United States*, 419 F.2d 582, 585 (5th Cir. 1969).

Defendant contends that the prosecutor vouched for the credibility of Lovell and Gilbert when in explanation

to the jury why their conversation with defendant made a sharp impression on them, he said:

> "And why do they remember that [conversation]? because these men have no criminal record, no prior involvement with the law, they are intelligent people, and for somebody to come up to them and propose that they do something illegal was surprising and shocking, and they remember it". (A1145).

Although neither witness was specifically asked on direct or cross-examination if they had a prior criminal record, the inference that they did not was an entirely reasonable one to draw in light of defense counsel's examination on excruciatingly minor, alleged misdeeds of the Governments' witnesses and his total failure to unearth any criminal record for either man.* In any event, when defense counsel objected and called the prosecutor's attention to the matter, the prosecutor immediately rephrased his argument and cautioned the jury that "more correctly put, [there was] an absence of proof of" any criminal records (A1146), thus curing any error there might have been. *Cf. United States* v. *Mallah*, 503 F.2d 971, 978-979 (2d Cir. 1974).

Defendant's final argument with respect to the prosecutor's summation is that he unfairly commented on defendant's failure to take the witness stand at his second trial. To support his contention, defendant culls from 30 pages of transcript three phrases which the prosecutor used.

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* By way of example, defense counsel exposed that Lovell practiced as an electrical engineer but held no engineering degree (A524-A525) and began to question Lovell about an alleged failure to make child support payments (A540-A544). Defense counsel also pointed out that Sue Pressman received mail in 1967 addressed to Dr. S. Pressman even though she did not hold an M.D. or Ph.D. degree (A1011-A1017).

> "What is the version of what happened by the witnesses who testified here in front of you?" (A1132-A1133).
>
> "So the case boils down to, really, do you believe these witnesses who testified here?" (A1142).
>
> "The Government submits to you that based on the credibility of the witnesses in this case, none of which were contradicted in any way whatsoever . . ." (A1152).

From these statements, defendant argues the prosecutor sought improperly to stress to the jury his own failure to testify. However, there was nothing in these isolated comments which the jury would "'naturally and necessarily' interpret . . . as a comment upon the defendant's silence . . ." *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3212 (October 15, 1974). Moreover, what defendant fails to note is that this was not a case where he had never given his version of the events in question but, rather a perjury trial where his version of events made under oath at some prior time was obviously to be contrasted and compared with the version of events given by the Government's witnesses at trial. All of the comments referred to above when taken in context do nothing more than this.* Any misapprehension that the jury might have had on this score was in any event more than corrected by Judge Ward's instruction

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* The statement that none of the witnesses were contradicted actually had nothing to do with defendant for his previous testimony obviously did contradict the testimony of the Government's witnesses. It referred, rather, to the lack of contradictions between the stories of the different Government witnesses and between what each of them had said on earlier occasions and at the trial itself.

that no inference should be drawn against Zeehandelaar for not taking the stand (A1185). *United States* v. *Dioguardi, supra* at 81.

POINT V

Defendant's sentence was legal.

As his last point, defendant contests the legality of the sentence imposed on him, arguing that the direction he pay $5,000 to the Department of Interior for use "in connection with [the] preservation of endangered species" (A1302) was a "forced philantropic contribution" (Defendant's brief, p. 43) and, as such, illegal. If Zeehandelaar is correct in that he will be forced to make a philanthropic contribution, the sentence was concededly improper. *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972). However, it is equally arguable that the $5,000 payment was simply a fine payable to the Government which was imposed as a condition of probation. When viewed in this light, the recommendation that the fine proceeds be used in a certain fashion becomes simply a precatory suggestion and has no effect on the lawfulness of the sentence. When a sentence is ambiguous, this Court has been free in construing the sentence so as to make it legal. *See United States* v. *Ferrara*, 451 F.2d 91, 98 (2d Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); *United States* v. *Caiello*, 420 F.2d 471, 476 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Government asks that it do just that in the instant case by construing or correcting the judgment to read in the manner indicated above.*

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* Alternatively, the Government suggests that the judgment of conviction be affirmed and the case remanded to the District Court for the sole purpose of re-sentencing defendant.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

WILLIAM R. BRONNER,
JOHN N. BUSH,
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Assistant United States Attorneys,
Of Counsel.

APPENDIX

Defendant's Testimony at the First Trial

(333) *

Q. Mr. Zeehandelaar, I call your attention to the testimony given by Mr. Marvin or Melvin Lovelle (sic.)** yesterday in this court. You were present when he testified, were you not? A. Yes, sir.

Q. I direct your attention to his testimony yesterday that he saw you in Tuson, Arizona, on April 15th, 1972. Do you remember that testimony? A. I do, sir.

Q. Did you see Mr. Lovelle on April 15th, 1972? Answer yes or no. A. No, sir.

Q. When did you see, if at all, Mr. Lovelle? A. On April 18th, 1972.

Mr. Wolff: With the Court's permission, I would like to mark that as Defendant's Exhibit for identification.

(334)

(Defendant's Exhibit P marked for identification.)

Q. I show you this pamphlet and ask you to briefly describe what it is. A. This is a printed program of the 14th Annual Western Zoos and Aquarium Conference held in the Arizona Inn, Tuson (sic.), Arizona, April 16 through 19, 1972.

Q. Briefly tell us, when did you get to Tuson (sic.) to attend that convention? A. In the afternoon or evening of April 14, 1972.

Q. And how long did you remain in Tuson (sic.) that trip? Did you remain until the 19th or after it, or leave before it? A. I remained there at least until Thursday, April 20; possibly a day longer, but I don't remember.

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* Page references are to the trial record.

** Melvin Lovell's last name is misspelled throughout most of the trial transcript.

Defendant's Testimony at the First Trial

Q. And tell us this, please: Do you recall on what day of the week April 15th was? A. Yes, sir. It was on a Saturday.

Q. When? A. Saturday.

Q. And what day of the week was it during—around that period when you saw Mr. Lovelle? A. April 18, which was a Tuesday.

Q. Mr. Lovelle testified that he saw you, I believe, in the morning of that day—no, the afternoon, around 3 (335) or 4 o'clock of the 15th of April on a Saturday. And I ask you, did you see him on that occasion? Yes or no. A. No, sir.

Q. Tell us how you came to talk to Mr. Lovelle? A. When I, as per my custom, consulted my office on Saturday morning, April 15 by telephone whether there was any message or anything specific in the morning mail, my bookkeeper, Mr. Walter Freundlich, gave me a telephone message that had arrived that morning from Mr. Lovelle.

Q. And what was the message. A. The message was that a Mr. Lovelle had phoned from Phoenix, Arizona, and had advised my bookkeeper that he, Mr. Lovelle, visited the U.S.D.I. on the previous day, that he was in the process of applying for an import permit to import a pair of young breeding cheetahs, and that he wanted to know an approximate price, and the end of the message was would I please return his call.

And he then furnished his area code and phone number.

Q. I show you a copy of Exhibit J typed up rather than in the handwriting testified to by Mr. Freundlich and ask you if you received the substance of that message over the telephone when you called your office from Mr. Freundlich? (336) A. Yes, sir, I did.

Defendant's Testimony at the First Trial

Q. Now, pursuant to that, did you telephone anybody regarding that message? A. Yes, I did.

Q. *Whom did you phone and what number did you call?* A. *I telephoned Mr. Lovelle at this number, 6—area code 602-937-4330.*

Q. *And what conversation did you have with him?* A. I introduced myself. I said "Mr. Lovelle, I have just been advised that you called my office and you told my office this same message"—and I repeated the same contents—"I am calling you back. What can I do for you?"

And he then said—do I continue?

The Court: The entire conversation, if you would.

A. He then said "What is the approximate price?"

And I said "The approximate price is between"—as I recall at this moment—"17 and $1900 each delivered to the United States."

He then said again "I visited U.S.D.I. yesterday and gave the same story."

I then questioned his qualifications to obtain what he described to be a zoological import permit.

I told him that a zoological import permit, which is not the same as a commercial import permit, would require (337) certain qualifications, facilities, et cetera, et cetera, facilities, housing, for the U.S.D.I. to grant him such a zoological import permit.

He then said that he was already aware of such possibility of not being qualified for such zoological permit.

He then asked me whether there was any other way of getting cheetahs, of a different kind of a permit.

I then told him that it was my intention to apply for a commercial permit for 20 cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

Defendant's Testimony at the First Trial

I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

Q. From whom? A. From U.S.D.I. From U.S.D.I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

That privilege is printed on the permit.

I told him also——

Q. What is the substance of the information? A. I told him also that I didn't consider such permission (338) *to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovelle, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species List.*

Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

He then asked me what if I sign a contract dated in March. And I said "Sorry, that can't be done."

The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tuson (sic.), Arizona, which is only 65 miles, 70 miles away, I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the opportunity of looking me up while we were at the Phoenix Zoo.

That was the end of the conversation.

Defendant's Testimony at the First Trial

Q. The telephone conversation? A. The telephone conversation.

Q. All right. Now, you didn't see him on April 15, you say? (339) A. No, sir.

Q. When did you see him, if you saw him at all? A. He came to visit me, to the best of my recollection, on April 18 at approximately 12:55 p.m.

Q. Can you state what directs your attention to the visit being on April 18 at 12:55 p.m. or thereabouts? A. Yes, sir. We were about to leave——

Q. Who is the "we"? A. The delegates, including myself, were about to leave at 1 p.m. by chartered bus for that visit in the Phoenix Zoo.

Q. And had you made an appointment to see Mr. Lovelle on either Saturday, April 15, or on Tuesday, April 18, 1972? A. No, sir, except that I suggested that he might want to visit me in Phoenix, but it was not an appointment. (340)

Q. What happened before you got on the bus with the other delegates to go to the Phoeniz Zoo? A. A few minutes prior to boarding the bus one delegate—and I don't recall his name—came to me, and I was waiting in the lobby, "There are two men to see you."

I followed the delegate into the lobby and he pointed the two men out to me. One of these two gentlemen was, as it now appears, the same gentleman who was here, Mr. Lovell. The other one, I still do not recollect his name. They were standing in the lobby.

They said, "I want to see you."

I said, "This is strange because I'm going to be leaving for the Phoenix Zoo in a few minutes. You could have saved yourself trouble if you came to the Phoenix Zoo this afternoon."

They said, no, they have to be here for reasons.

I said, "I have little time. I don't want to miss my charter bus."

He then, again, brought up the subject, very briefly, whether I could in some way help him either import cheetahs or sell cheetahs under a permit for him, saying something.

I told him we discussed it already at greater lengths in the past Saturday and there was nothing further I could (341) do at that time.

Then—I was kind of made for the inconvenient time —I apologized because I had never seen these gentlemen before. I apologized for my erratic behavior, and then I rushed out and made the bus.

Q. Did you ever hear from or see Mr. Lovell again? A. Never.

Q. *Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?* A. *No, sir.*

Q. Did you har (*sic.*) Mr. Lovell mention who recommended him to communicate with you in his testimony? A. Yes, sir.

Q. Who was it? A. He mentioned the name of Mr. Baysinger.

Q. Who is Mr. Baysinger, briefly? A. Mr. Earl Baysinger is an official of the Office of Endangered Species at the USDI in Washington, D.C.

Defendant's Testimony at the First Trial

Q. What does he have to do with issuing permits (342) for imported endangered species?

Miss Eristoff: Objection. That is irrelevant.

The Court: I don't see the relevancy of this.

Mr. Wolff: I will connect it in a moment.

The Court: If you know, all right.
Answer the question if you know.

A. Repeat the question.

(The question was read.)

A. He is to be consulted as to the qualifications of the applicant if the applicant is an applicant applying for a zoological permit, that is a permit, Section 17.12.1(b).

Q. Did Mr. Baysinger ever recommend anybody else before or after April 15th or April 18th to you? A. To me?

Q. Yes. A. No.

* * * * *

Defendant's Motion for Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 938 (RJW)

UNITED STATES OF AMERICA,

—v.—

FRED J. ZEEHANDELAAR,

Defendant.

SIR:

PLEASE TAKE NOTICE that upon the indictment herein and all the proceedings heretofore had thereon and all the proceedings which related to indictment 72 Cr. 1328 and the affidavit of Joseph E. Brill, sworn to the 21st day of October, 1974, a motion will be made addressed to Hon. Robert J. Ward, United States District Judge, at the United States Court House, Foley Square, New York, N.Y., for an order pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars with respect to Count Two of the indictment, as follows:

1. With respect to each of the alleged "discussion or discussions among Fred J. Zeehandelaar, the defendant and Melvin Lovell and Frank H. Gilbert" set forth in Paragraph 2, state

   a) The specific place and location thereat where each such alleged discussion was had

   b) The date and the time on such date when each of such alleged discussions was had

   c) The person or persons present at each such alleged discussion

d) Each of the statements, or substance thereof, made by each of the persons present at each such alleged discussion

e) Specify the person to whom each such alleged statement was made and by whom it was made and who if any one else was present at such time and place

f) With respect to each such alleged discussion, set forth the "matter material" to the proceeding described in paragraphs 1 and 2 of Count Two specifying each of the respects in which such "matter" was "material" to that proceeding

g) If any of such alleged discussions was not had in the physical presence of the persons described in paragraph 2, state the manner or method by which such discussion was had and furnish the particulars demanded *supra* with respect to each

2. As to paragraph 3 of Count Two, state specifically with regard to each of the answers therein set forth attributed to the defendant the respects in which

a) Each such answer is false and

a1) Set forth the truth of each such answer

b) Each such answer was "matter material" to the proceeding described in paragraphs 1 and 2 of Count Two and

b1) Set forth the materiality of each such answer to the proceeding described in paragraphs 1 and 2 of Count Two

3. If any of the particulars demanded *supra* are now claimed to be unknown to the Government, state specifically

a) Which of such particulars are unknown and

b) Whether the Government expects to obtain information relative to such particulars and

c) If the answer to 3(b) *supra* is affirmative, set forth the name and address of the person or persons from whom or any other source from which the Government expects to obtain such information and

d) Approximately when the Government expects to obtain such information

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 21, 1974.

Yours, etc.,

JOSEPH E. BRILL
Attorney for Defendant
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New York, N. Y. 10007

JAC M. WOLFF
Attorney for Defendant
655 Madison Avenue
New York, N. Y. 10021

To:

PAUL J. CURRAN, Esq.
United States Attorney
United States Court House
Foley Square
New York, N. Y. 10007

Government's Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 938 (RJW)

UNITED STATES OF AMERICA

—v.—

FRED J. ZEEHANDELAAR,

Defendant.

The Government states for its Bill of Particulars the following (the responses herein are keyed to the corresponding paragraphs in defendant's request for a Bill of Particulars):

1a)-1c) The "discussion or discussions" referred to in paragraph 2 in Count Two of the present indictment took place as follows:

On April 15, 1972, in mid-morning, defendant called Melvin Lovell at Mr. Lovell's home in Phoenix, Arizona. Based on the evidence now known to the Government, the Government believes that defendant was at the Azirona Inn, Tucson, Arizona when he placed the call.

On April 15, 1972, in mid-afternoon, the defendant, Melvin Lovell and Frank H. Gilbert met at the Arizona Inn, Tucson, Arizona. Numerous other persons were present in the room where the three men met, but only defendant, Mr. Lovell and Mr. Gilbert were party to the discussion covered by the present indictment.

1d)-1e) The substance of the statements which were made in the phone conversation between Mr. Lovell and defendant and the person making each such statement may be found at pages 187-188 of the transcript of defendant's trial under Indictment 72 Cr. 1328.

Government's Bill of Particulars

1f) The "matter material" is found in defendant's answers to the two questions set forth on page 3 of the present indictment. The aforementioned testimony of defendant was "matter" which was "material" to the critical issue in the trial under Indictment 72 Cr. 1328—whether or not the defendant knowingly and intentionally submitted an application to the Department of the Interior to import cheetahs into the United States which was false because it contained back-dated documents. Proof that on another occasion, defendant had offered to back-date certain other documents which were to be submitted in an application to the Department of the Interior for a similar permit had a major impact on this issue.

1g) See the responses above.

2a)-2b1) The answers of defendant set forth on page 2 and on the first two lines of page 3 of the present indictment are false in that defendant made no such statements in the telephone conversation between himself and Mr. Lovell on April 15, 1972 or in any phone conversation between himself and Mr. Lovell on any other date. In truth, in the phone conversation, Mr. Lovell explained, to defendant that he was interested in applying for a zoological permit to import Cheetahs into the United States, and the two men arranged to meet in person later on the same date. The Government does not contend that this falsehood was material to the outcome of the trial under Indictment 72 Cr. 1328.

The two full answers of defendant appearing on page 3 of the present indictment are false in that defendant never told either Mr. Lovell or Mr. Gilbert that the "switching" of Cheetahs from the "kingdom permit" to them would be difficult because they did not have a contract "prior to the effective date that the Cheetah was placed on the Endangered Species List." Nor, did defendant state that he

considered it "unlikely" that the Department of Interior would allow him to do the "switching." Furthermore, neither Mr. Lovell nor Mr. Gilbert asked him to "sign a contract dated in March," and he never responded to any such request by saying "'Sorry, that can't be done.'" In truth, defendant told Mr. Lovell and Mr. Gilbert that while it was illegal to import Cheetahs into the United States without a permit, he could siphon off several Cheetahs for them from a shipment he expected for another customer. In addition, he told them that they had made a mistake in speaking to an employee of the Department of Interior before they spoke to him because now the Department of the Interior was alerted to their desire to import live Cheetahs. Lastly, it was he, not Mr. Lovell or Mr. Gilbert, who proposed that a contract for the importation of Cheetahs be back-dated to before the effective date of the regulations of the Department of the Interior controlling the importation of that animal into the United States so as to avoid the impact of those regulations. The falsity of defendant's answers had a material bearing on the trial under Indictment 72 Cr. 1328 for the reasons set forth in paragraph 1f) above.

3. Not applicable.

Dated: New York, New York
November 15, 1974.

Yours etc.,

PAUL J. CURRAN
United States Attorney

By: WILLIAM R. BRONNER
Assistant United States Attorney
Telephone: (212) 791-1946

Government's Amended Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 938 (RJW)

UNITED STATES OF AMERICA,

—v.—

FRED J. ZEEHANDELAAR,

Defendant.

The Government, for an amendment to its Bill of Particulars, states as follows:

1. The Government's Bill of Particulars is incorporated by reference herein.

2. Response "1d)-1e)" is amended to include the following paragraph at the end thereof:

"The substance of the statements which were made during the in-person meeting between Mr. Lovell, Mr. Gilbert and the defendant, and the person making each such statement, may be found at pages 185-186, 197-203, and 529-532 of the transcript of defendant's trial under Indictment 72 Cr. 1328."

Dated: New York, New York
November 18, 1974

Yours, etc.,

PAUL J. CURRAN
United States Attorney

By: WILLIAM ROCHE BRONNER
WILLIAM R. BRONNER,
Assistant United States Attorney

★ U. S. Government Printing Office 1975— 614—212—487

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Olga C. Grumpp being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of March 1975 he served a copy of the within Brief & Appendix, Motion & Affidavit by placing the same in a properly postpaid franked & not/ envelope addressed:

Joel M Wolff
655 Madison Ave.
N.Y. N.Y. 10021

Henry J. Boitel
Rm. 5102/233 Broadway
New York, N.Y. 10007.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Olga C. Grumpp

Sworn to before me this

28th day of March 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975